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TN REGULATORY AUTHORITY
DOCKET ROOM

April 10, 2003

Tennessee Regulatory Authority
Attn: Sharla Dillon
460 James Robertson Parkway
Nashville, TN 37238

Re: Citizens Telecommunications Company of Tennessee, LLC d/b/a Frontier
Communications of Tennessee; Docket No. 03-00211

Dear Ms. Dillon:

Enclosed for filing please find the original and fourteen (14) copies of the Petition to Intervene and/or Response and Motion to Dismiss of Ben Lomand Communications, Inc. My check in the amount of \$25.00 is also enclosed. Copies have been provided to parties of record. Thank you for your assistance. Please do not hesitate to contact me if you have questions or if we need to discuss this.

Sincerely,



H. LaDon Baltimore
Ben Lomand Communications, Inc.

LDB/dcg
Enclosures

cc: Levoy Knowles
James Dempster, Esq.
Guilford F. Thornton, Jr., Esq.

IN RE:

**CITIZENS TELECOMMUNICATIONS
COMPANY OF TENNESSEE, LLC,
d/b/a FRONTIER COMMUNICATIONS
OF TENNESSEE,**

IN REGULATORY AUTHORITY

DOC DOCKET NO 03-00211

Petitioner.

Ben Lomand Communications, Inc. (“Ben Lomand”) files this petition to intervene¹ and/or response to and motion to dismiss the petition of Citizens Telecommunications Company of Tennessee, LLC (Citizens) in this matter. Ben Lomand objects to Citizens’ petition as being without justification, either procedurally or substantively. Ben Lomand requests that the Tennessee Regulatory Authority (“TRA”) dismiss the petition without convening a contested case. In support of this petition to intervene, response, and request to dismiss, Ben Lomand states as follows:

¹ As there is a question as to whether this is a contested case at this stage (this is not a complaint against Ben Lomand), and whether Ben Lomand is a party merely because it was served with a copy of the petition, Ben Lomand, out of an abundance of caution, files this response to the petition, including a petition to intervene. If the TRA determines that a petition to intervene is not necessary, then consider this filing as a response to Citizens' petition.

I. PETITION TO INTERVENE

Ben Lomand, pursuant to Tenn. Code Ann. §4-5-310, petitions the TRA to grant it leave to intervene in the above-captioned proceeding and for grounds states that:

1. Ben Lomand is a diversified telecommunications company, duly certified to do business in the State of Tennessee by the TRA through the grant of a certificate of convenience and necessity and by franchises from the subject cities to furnish local exchange telecommunications, primarily telephone services, in the cities of McMinnville and Sparta.
2. Ben Lomand's legal rights, duties, privileges, and immunities or other legal interests will be affected or determined by the outcome of this proceeding.
3. Ben Lomand's participation will not impair the interest of justice or the orderly and prompt conduct of the proceeding.
4. Recognizing that Ben Lomand's interests are paramount in this proceeding, complainant Citizens served Ben Lomand with a copy of the petition upon its filing.

II. RESPONSE AND MOTION TO DISMISS

In the event this matter is considered a contested case, therefore necessitating a response within thirty (30) days of date of service, this response is filed as an alternative to the petition to intervene to comply with the requirement that responsive pleadings be filed within 30 days after service. TRA Rule 120-1-2-.03(1). In the event the TRA grants the petition and convenes a contested case, Ben Lomand reserves the right to amend this response to reflect such decision and to further address the issues as necessary and as issues emerge.

1. Citizens' petition should be dismissed because this issue should be addressed by the TRA through a rule making proceeding. This petition is one of first impression at the TRA. Exempting an incumbent local exchange company from the requirements of a price floor is more far reaching than this one matter. A rule making proceeding would determine what factors and guidelines are necessary before relief is granted from the requirement of a price floor. If this petition is granted and petitioner is relieved from a price floor, others will be in line to request such relief.

The issues involved are of such major import that they should not be decided on a case by case basis, but as a result of a careful, thought out procedure under guidelines, rules, and regulations adopted by the TRA. Other factors are involved when relief from a price floor is requested. The interplay of such issues as cross-subsidization, predatory pricing, price squeezing, price discrimination, tying arrangements, or other anti-competitive practices. Without such rules, any incumbent local exchange company facing competition will request the TRA to relieve it of the requirements of a price floor.

The statute states that relief from a price floor is only when it is "shown to be in the **public interest**," not when an ILEC faces competition. (Tenn. Code Ann. §65-5-208(c)) (emphasis added). Therefore, the TRA should dismiss this petition and initiate a rule making proceeding to determine when it is in the public interest for an incumbent local exchange telephone company to be relieved from the requirement of a price floor.

In the event the TRA does not initiate such a rule making proceeding, the petition should still be dismissed as set forth below.

2. Citizens' petition should be dismissed because it is not in the public interest.

Citizens' petition sets forth why relief from a price floor is good for Citizens, but does not establish why it is in the public interest, as required by Tenn. Code Ann. §65-5-208(c). Citizens states that it should be exempted from the price floor because it is losing business. This is not a basis for exemption from the price floor requirement. Citizens makes the argument that it needs to price below cost in order to stay in business. The answer is not to price below cost, but to adopt more competitive practices and strategies.

Contrary to Citizens' argument, the statutory price floor exemption provision was not adopted to address the competitive situation where adherence to a price floor could place an ILEC at a distinct disadvantage. The provision was adopted to give the TRA the option to exempt the price floor requirement when it is "in the public interest." Nowhere in the statute nor in legislative proceedings is mentioned the fact that this is due to help an ILEC who is at a competitive disadvantage.

3. Citizens' petition should be dismissed because it is not in the public interest and will allow Citizens to engage in not only below cost pricing but to engage in other anti-competitive practices. By being able to engage in below cost pricing, Citizens then would be able to underprice its competition and therefore remove all competitors, thus resulting in a monopolistic market, which is definitely not in the public interest.

4. Citizens' petition should be dismissed because other ILECs will request relief from the price floor requirement whenever there is meaningful competition. Whenever an ILEC loses customers, then an ILEC will invoke the precedent of this petition and ask for relief from the price floor requirement in order to price below cost and avoid other regulations designed to protect the

consumer. If every ILEC, including Citizens, is allowed to price below the cost floor, then it will use its market predominance to subsidize predatory pricing through other services.

5. Citizens' petition should be dismissed because it is not in the public interest to allow certain prices to be below the price floor while increasing the price of other services. Citizens admits that it "intends to cover any losses sustained from pricing its services below the cost floor from profits earned from additional services sold its consumers in McMinnville and Sparta." (Citizens' petition filed in this matter, at paragraph 10, page 4). This is an admission that it intends to charge high prices in order to subsidize this service. Such is not in the public interest and does not benefit the consumers in McMinnville and Sparta.

6. Citizens' petition should be denied because it in effect deregulates Citizens from the authority of the TRA. No guidelines have been set by any other rules or statutes as to what other regulations, rules, and statutes that Citizens should follow if it is exempted from the requirement of a price floor. The TRA has not adopted other rules or issued orders to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements, or other anti-competitive practices as required by Tenn. Code Ann. §65-5-209(c) in order to exempt an ILEC from the requirement of a price floor.

Citizens recognizes this argument in that in paragraph 13 of its petition, it "agrees to continue to file tariffs and other materials as required by law." Does Citizens then decide which laws it agrees to follow and which it does not agree to follow?

7. Citizens' petition should be dismissed because it is not for the purpose of serving the public interest, but to avoid an adverse ruling in the complaint of Ben Lomand against Citizens

alleging that Citizens/Frontier has engaged, and continues to engage, in discriminatory and anti-competitive practices in violation of state law and orders of the TRA, in Docket No. 02-01221. This filing by Citizens to seek relief from the requirement of the price floor is an admission, as Ben Lomand has charged in its complaint against Citizens/Frontier, that Citizens is pricing below cost in violation of state law. If the relief requested by Citizens is granted, then Citizens/Frontier will be allowed to price below cost in violation of state law.

The petition of Citizens is an admission that Citizens is pricing below costs and is now asking the TRA to approve such below cost pricing. Basically, this petition is asking the TRA to approve every practice alleged by Ben Lomand in its complaint against Citizens/Frontier which Citizens has denied but is now admitting that it is engaging in such practices and is asking for the TRA to approve such denied practices.

If Citizens/Frontier is not pricing its services below cost, then this petition of Citizens is without merit.

8. Ben Lomand admits that it is a successful competitor of Citizens as alleged in paragraphs 2, 4, 5, and 6. However, the fact that Citizens is facing a competent and successful competitor such as Ben Lomand, is not grounds for relief from the requirements of a price floor. The requirement for such relief is "in the public interest," not that an ILEC faces stiff competition. Ben Lomand is a successful competitor because of its successful business tactics, and does not need permission from the TRA to price below costs and engage in other anti-competitive practices.

9. In paragraph 7 of its petition, Citizens "notes that [Ben Lomand] has presented no evidence to substantiate its claims" in its complaint against Citizens/Frontier in Docket No. 02-

1221. Ben Lomand has made the necessary allegations to support a petition for a contested case, which has been granted. The evidence to substantiate its claims is the subject of such contested case and will be developed through discovery and a hearing. Also, Ben Lomand has enough evidence to substantiate its claims of below cost pricing by Citizens' admissions in this petition.

10. The fact that Citizens continues to lose business to Ben Lomand, as stated in paragraph 8 of the petition, is not reason to secure relief from the statutory requirements of a price floor.


11. Citizens alleges, in paragraph 9 of its petition, that every time Citizens loses a customer of its basic flat rate service, it loses additional discretionary services and features that are highly profitable for Citizens. Again, this is a reality of competition, not a basis for relief from the requirements of a price floor.

12. Citizens alleges, in paragraph 10 of its petition, that it does not subsidize its services in McMinnville and Sparta from other exchanges. This is an issue in Docket No. 02-01221 and will have to be considered in such docket. However, the filing of this petition for relief from the price floor requirement is an admission, that Citizens is pricing below cost in McMinnville and Sparta. Logic requires that the subsidization of such low cost pricing is from customers outside the McMinnville and Sparta areas and not from its admittedly over-priced discretionary services and features purchased by the customers in McMinnville and Sparta.

13. Ben Lomand has already addressed the assertions of Citizens in paragraphs 11, 12, and 13 in the paragraphs *supra* that specifically assert why this petition should be dismissed.

WHEREFORE, Ben Lomand Communications, Inc. requests that the Tennessee Regulatory Authority dismiss the petition filed by Citizens Communications, Inc. and decline to convene a contested case.

Respectfully submitted,


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Counsel to Ben Lomand Communications, Inc.

Certificate of Service

The undersigned hereby certifies that on this the 10th day of April, 2003, a true and correct copy of the foregoing has been forwarded via first class U. S. Mail, hand delivery, overnight delivery, or facsimile transmission to the following.

Guilford F. Thoronton, Jr., Esq.
Stokes, Bartholomew, Evans & Petree
424 Church Street, Suite 2800
Nashville, TN 37219

Richard Collier, Esq.
General Counsel
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460 James Robertson Parkway
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H. LaDon Baltimore